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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No.----------

ALFRED SIDNEY BARTON,
Petitioners,

vs.

THE PHELAN COMPANY.

and

ROBERT L. PACE,
Petitioners,

vs.

THE PHELAN COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE FIRST CIRCUIT OF THE STATE OF LOUISIANA AND SUPPORTING BRIEF

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Alfred Sidney Barton and Robert L. Pace, respectfully petition this Honorable Court for a writ of certiorari to the Court of Appeal of the First Circuit of the State of Louisiana at Baton Rouge, Louisiana, to review the final decree of that Court in the above causes. A certified transcript of the record in said causes, including therein the proceedings in the said Court of Appeal and in the Supreme Court of the State of Louisiana, accompanies this petition in accordance with the rules of the Supreme Court of the United States.

I

SUMMARY AND SHORT STATEMENT OF MATTERS INVOLVED.

This petition involves the questions of whether the Court of Appeal of the First Circuit of Louisiana, in the decree it rendered in these cases (200 So. Rep. 508), deprived either or both of petitioners of liberty or property without due process of law or denied them or either of them the equal protection of law, in violation of the Fourteenth Amendment of the Constitution of the United States. As alleged by them in their application for rehearing in said Court of Appeal and in their application to the Supreme Court of the State of Louisiana, they now aver that, for reasons specifically set forth herein, the decree of the Court of Appeal deprived each of them of property and liberty without due process of law and denied each of them the equal protection of law, in violation of the 14th Amendment of the Federal Constitution.

The Complaint or petition of each of plaintiffs in instituting these suits avers substantially in part:

That about 7 o'clock, p. m. on the night of October 4th, 1938, on the Evangeline paved highway, about five miles west of Kinder, Louisiana, and about 500 yards east of the Calcasieu River bridge, through the negligence of the driver of defendant's large trailer truck then traveling west there was a collision between the Ford Sedan in which plaintiffs were riding, and being driven by plaintiff Barton, resulting in said injuries

to plaintiffs. That at the time of and immediately before the said truck was being operated at a speed of about sixty miles an hour, with glaring headlights and in a reckless manner; that when the driver of Barton car being partly blinded by the bright lights on truck and seeing the truck swerving over to the south side of the highway, he began to pull his car over more to the south side of the highway; that when the collision occurred the left wheels of truck were about four or five feet south of the middle of the pavement of highway and the right wheels of the Ford car were a few inches over on the south shoulder of the highway.

That immediately after said collision the driver of truck stated that it was on account of a yearling or cow in the highway ahead of him which caused him to swerve his truck to the south side of the highway; but plaintiffs aver that whatever cow the truck driver saw in the highway was seen or could have been easily seen by him on proper look out in time to have stopped said truck without chasing her down the highway and before reaching the point where said cow jumped across the highway.

The answer of defendant denies such of said allegations of plaintiffs not expressly admitted. It admits the collision; that the "Ford stopped within about one hundred and fifty feet (150) from the point of collision." The answer further states:

"It is admitted that the defendant driver did see the cow on said highway and that he could have stopped

his truck had there been any danger of striking said cow, but it is averred that no such danger presented itself." That "prior to and at the time of noticing the said cow, said driver saw approaching from the west the lights of another vehicle;" that this crossing of cow and approach of the other automobile caused the driver of truck to take the precautions of pulling the truck "to the extreme right side of the road" in order "to give as much room as possible for said automobile to pass said cow and truck in safety, but said automobile in attempting to dodge said cow made an effort to pass between said cow on his right and said truck on his left, and in doing so said automobile's right front fender and wheel struck said cow, and then it skidded into the left rear or drive wheel of the truck."

Defendant's answer avers that the excessive speed and reckless manner in which plaintiff Barton was driving his said car caused the said collision.

Defendant's answer in the case of Robert L. Pace avers in part: "that plaintiff did not, either prior to or at the time of said accident, protest against the negligent manner in which said automobile was being operated, but on the contrary plaintiff acquiesced, condoned, approved and consented to each and every act of negligence of said driver of said automobile, and is, therefore, guilty of negligence which was the sole and primary cause of said accident from which his injuries resulted, and such negligence bars his right to recover from defendant.

In the alternative, defendant's answer avers that the said negligence of plaintiffs contributed to the said accident and "was the proximate cause thereof."

These two cases were consolidated in the Court of original jurisdiction for trial and appeal. They are actions in tort based upon the same motor vehicle collision between a Chevrolet Trailer Truck of defendant and a V-8 Ford Sedan being driven by plaintiff Barton, who sued defendant for the sum of $22,500 for personal injuries causing the amputation of his left arm. Plaintiff Pace sued defendant, Phelan Company, for $15,-250.00, for injuries to his eyes and other parts of his body.

The introduction of testimony was finally concluded in these cases on December 12, 1939, and the cases were submitted for decision on briefs, that of defendant being filed on April 22, 1940. On May 9, 1940, the trial Court rendered judgment supported by short written opinion, rejecting the demands of plaintiffs. The testimony of about 28 witnesses, five of whom were eye witnesses to the collision and three of whom were apparently disinterested witnesses who came to the scene of accident within 25 seconds thereafter, was all disposed of or dispensed with by the following statement in said opinion:

"The evidence in this case is so contradictory, and in the opinion of the Court so colored by the witnesses on both sides that the Court is compelled to say in the main it must be totally disregarded." After making that

holding the opinion of the trial Court states as a basis for its judgment:

"The evidence shows that the wheel of the truck was so damaged by the impact with the automobile that the brake locked, causing the wheel to skid on the pavement, making a mark on the pavement which was clearly visiable both to the witnesses and which shows clearly in the pictures which were presented in Court.

"The skid mark started on the North side of the black or center line, showing beyond any question of a doubt that the collision took place not on the South or Barton's side of the black line, but on the North or Phelan's side of the black line. * *"

Nothing in the opinion of the trial Court indicated that plaintiff Barton had done or failed to do anything constituting negligence, contributing to the accident. Its opinion did not hold that the negligence of the truck driver had not caused the accident.

JUDGMENT OF COURT OF APPEAL

The judgment and opinion of the Court of Appeal in said cases (200 So. Rep. 508), although making some illogical, disconnected remarks beyond the holding of the trial Court, affirmed the holdings of the trial Court, and disregarded and refused to mention or discuss any of the testimony of the five eye witnesses to the accident or any of the much weighty testimony favorable to plaintiffs. The questions of negligence and contributory

negligence made the vital issues in the cases, are not determined nor discussed by the Court of Appeal in its judgment or otherwise. So far as what that Court stated there is nothing to show that any of the many eye witnesses testified nor what they testified.

It refused to mention or to discuss the testimony, which showed the Barton car was partly on the south shoulder of the highway at time of collision, or which showed the Barton car could not have struck the Phelan truck on the north side of the highway because the front end of Barton car was not struck in the collision. Nothing supports either the decision of the Court of Appeal of the First Circuit of Louisiana or that of the 14th District Court of that State in these cases, other than the fact that either before the collision or immediately after same the long, heavy trailer truck of defendant made a sudden abrupt swerve to its left toward the south, and, after going just south of the center of pavement continued on the south side almost parallel with middle black line (as shown by skid marks) for about fifty feet, when the truck was about four feet south of the middle black line, whereupon it abruptly swerved back toward the north side of the highway. Copies of the printed brief of plaintiffs used in the Court of Appeal, marked "Exhibit A" are filed along with this application. By reference to pages 8 and 9 of that brief a picture of the said skid marks and scene of accident with explanation thereof can be observed.

II

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The judgment of the Court of Appeal of the First Circuit of the State of Louisiana (200 So. Rep. 508) was pronounced or rendered without any judicial determination of the facts which alone can support such a judgment, and, therefore, the said judgment is merely the arbitrary edict of that Court and is as much wanting in due process of law and equal protection of law as though the plaintiffs had not been afforded the opportunity to introduce testimony or to argue the said cases.

Chicago, Burlington & Quincy Railroad v. City of Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 14 Law E. 979.
Huetberg v. Anderson, 97 N. E. 216.
Chapman v. Crane, 123 U. S. 540, 8 Sup. Ct. 211, 215.

2. While plaintiffs were permitted by the trial Court to introduce such relevant testimony as they offered, neither the trial Court nor the Court of Appeal discussed nor considered the important, vital parts of said testimony. It is established beyond dispute by many decisions of the United States Supreme Court that the rejection of any material testimony, which might change the results of decision in the case, violates the due process provisions of the 14th Amendment of the Federal Constitution. Those decisions equally support the contention that to permit the introduction of such testimony, and then to arbitrarily refuse to consider

same, likewise violates the prohibitions in said amendment against denial of due process and equal protection of law. To hold the Court must allow the introduction of relevant testimony which may change the results, and then hold that after it is introduced the said Court may arbitrarily refuse to consider same, can find no just nor logical support.

Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524.
Scott v. McNeal, et al., 154 U. S. 34, 14 Sup. Ct 1108.
Georgia Railway & Electric Co. v. City of Decatur, 295 U. S. 165, 55 Sup. Ct. 701.
Postal Telegraph Cable Co. v. City of Newport, 247 U. S. 464, 38 Sup. Ct. 566, 570.

3. These prohibitions contained in the Fourteenth Amendment of the Federal Constitution against depriving one of property or liberty without due process of law and the denial of equal protection of law, "extend to all acts of the state, whether through its legislature, its executive, or its judicial authorities."

Scott v. McNeal, 154 U. S. 34, 14 Sup. Court 1108, 1112.
Hebert v. State of Louisiana, 272 U. S. 312, 47 Sup. Ct. 103, 104.

4. The motives of courts, like that of the legislature, when "considered as to the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural reasonable effect of their enactments" or judgments. "The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, preclude all

such inquiries as impracticable and futile."

Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 734.

The decisions of the Trial Court and the Court of Appeal in these cases abandoned the usual custom of Courts, to take up in some kind of order the testimony of the witnesses and the questions of law and give reasonable time and consideration thereto. It disregarded vital judicial admissions made in the answer of the defendant, either showing or tending to show negligence on part of the driver of the truck of defendant. It disregarded most of the vital testimony in the cases, and adopted the physical fact that the truck skidded from its side of the highway to the south side as "showing beyond any question of a doubt that the collision took place" on the north or Phelan side of the said highway, and then without considering the emergency rule of law of the State of Louisiana, or holding either of plaintiffs guilty of any negligence, rejected their demands. Under the above rule laid down by this Honorable Court, the motives of the said Court in so acting and ruling should be held done for the deliberate purpose of denying plaintiffs the equal protection of law and depriving them of their rights, property and liberty without due process of law.

5. The judicial admissions made by defendant in its answer states that its driver saw the cow in the highway ahead of him long enough to have stopped; that "prior to and at the time of noticing the said cow, said driver

saw approaching from the west the lights of another vehicle;" that said truck driver then took the precaution of pulling the truck over to "the extreme right side of the road" in order "to give as much room as possible for said automobile to pass said cow and truck in safety, but said automobile in attempting to dodge said cow made an effort to pass between said cow *on his right and said truck on his left*, and in doing so said automobile's right front fender and wheel struck said cow, and then it skidded into the left rear or drive wheel of the truck."

Under the laws of the State of Louisiana the said defendant is bound by the foregoing judicial admissions.

Winn v. Veal-Winn Co., 134 So. 264.
Adams v. Bell Motors, 121 So. 345.

These judicial admissions show that plaintiff Barton was in an emergency; that a cow and a large truck in close proximity to him were coming toward him; that the cow was on his right and the truck on his left, both on the pavement; that the truck driver seeing the situation attempted to make room, but did not stop as defendant admits he could have done; that Barton in attempting to avoid the danger struck the cow and skidded over and struck the truck.

The evidence of the eye witnesses in the case shows Barton did not see the cow until it was too late for him to slow his car down enough to avoid the accident. It shows that the driver of the truck did see the danger in time to slow his truck down and avoid the accident, but

the driver of the truck made no effort to slow the truck down although he saw the cow in the road first as much as 200 feet ahead of him; that the truck was within a few feet of the cow when she jumped across the road. The evidence does not show Barton's car struck the cow. It shows the contrary.

Under the law of the State of Louisiana, especially what is called the emergency rule, defendant is liable in these cases though it be found that the Barton car did strike the truck of defendant on the north side of the said highway.

Logrand v. Dugan, 196 So. Rep. 564, La. App.
Jacob v. Edwards, 171 So. Rep. 165, 167, La. App.

The great effort made in behalf of plaintiff to get the Court of Appeal to determine the evidence applicable to this emergency rule was of no avail.

6. The more the decision of the Court of Appeal is considered and its failure to discuss the vital issues and testimony of witnesses thereon, and the great emphasis it places upon matters of no importance, the more it will appear that it is merely an edict, depriving plaintiffs of their rights. To an extent its style beclouds the effects of the said decision. As pointed out in the application for rehearing and in application to the State Supreme Court for writ of certorari, said opinion of the Court of Appeal gives great enough weight to the clearly worthless testimony of witness LaFasse to overturn that of about seven witnesses who testified to finding shattered glass at point the truck went farthest to the south

side of the highway. Yet, the testimony of Lafasse, even as recited by said opinion, did not state whether or not there was broken glass at point skid marks went farthest to south. This holding is cited to show the determination of the organ of the Court preparing said decision to decide the cases against plaintiffs without a fair and full consideration of the facts.

7. There are many special and important reasons why the writ of certiorari herein sought should be granted, most of which are suggested in the foregoing portions of this application. The amount of work and expenditure required to make an application to this Honorable Court for a writ of certiorari, in a case involving such a large record usually makes same practically impossible. Therefore, any disposition to arbitrarily decide the case as the Court desires is encouraged or augmented in such cases. While it is well known by all able and honest Judges and lawyers, that occasionally such unfair, arbitrary and illegal decisions are rendered, yet there have been few efforts made to stop or expose said abuses through applications for writ of certiorari to this Honorable Court. A decision in these cases by this Honorable Court on the issues herein presented should be of tremendous value and force in encouraging just decisions in Courts.

8. The physical fact of the skidding of truck from its side of the highway, without strong corroborating testimony, would not show that the Barton car struck the truck on the north side of the highway. It would

require very strong proof to show the light Barton car could have so injured the heavy truck of defendant, as to cause the heavy truck to suddenly swerve to its left, while the Barton car moved on 150 feet farther down the highway. Such appears impossible. The holding of the Court of Appeal that such skidding was so convincing that no testimony of eye witnesses or other physical facts could impair same, is contrary to law, reason physics or experience.

The contrary was held in the following cases:

Western & A. R. R. v. Henderson, 279 U. S. 639, 49 Sup. Ct. 445.
McMichael v. Illinois Central R. Co., 110 Louisiana Rep. 18, 19.
Wright v. Petty, 7 La. App. 584, 586.

The so-called physical facts adopted and urged with such apparent certainty by the Court of Appeal could not prove that the Barton car struck the truck and caused it to suddenly swerve and go in the direction from which the Barton car came. The testimony of four eye witnesses to the contrary, which was corroborated by other witnesses and several strong physical facts, should have been considered by the Court of Appeal. The testimony of witnesses that the driver of the truck admitted his dodging the cow caused the collision should have been considered. The testimony and facts showing that the truck driver and witness Vandergriff had given false testimony should have been considered. The fact that no weight was given in favor of plaintiffs by the Court of Appeal to any testimony introduced, indicates the extreme unfairness of the said decision.

9. The decisions and jurisprudence of the United States Supreme Court authorizes this Court to read and consider any and all the testimony in these cases to determine the Constitutional or Federal questions presented herein.

10. The evidence in these cases does not disclose that any negligence or carelessness of plaintiff Pace aided in causing his said injuries.

Pace was riding when injured as an invited guest. The law of the State of Louisiana and the jurisprudence of its Supreme Court is to effect that the invited guest is not responsible for the negligence or contributory negligence of the driver of motor vehicle in which he is riding, unless he knew of same in time to take some action to avoid injury thereby and failed to act to avoid the danger.

Churchill v. Texas & Pacific R. Co., 151 La. 726.
Delaune v. Breaux, 174 La. 43.
Maritzky v. Shreveport Ry. Co., 144 La. 692.

The decision of the Court of Appeal in the cases of petitioners in no manner held or stated that there had been any negligence acquiesced in or condoned by said Pace. His demands were simply refused by that Court without any determination thereof. Plaintiff Barton's claims were likewise refused without a determination of the vital question of negligence in the case.

(See 200 So. Rep. 508.)

11. The law of the State of Louisiana is to effect

that the defense of contributory negligence must be alleged and established by a fair preponderance of evidence for it to avail the pleader or to prevent the recovery of a claimant in an action on a tort.

Buechner v. City of New Orleans, 112 La. Rep. 599, 601.
Rigby v. Aetna Casualty & Surety Co., 151 So. 119 (La. App.)

The evidence in these cases does not disclose any negligence or contributory negligence on the part of either of plaintiffs. There is no such holding made by the Court of Appeal or the trial Court. The said Courts utterly failed to determine the facts and issues in these cases.

12. The law and the jurisprudence of the State of Louisiana required the said Court of Appeal to "decide all the points in the controversy between the parties."

Code of Practice of Louisiana, Art. 539.

The Constitution of Louisiana, Article 7, Section 1, in part provides: "The judges of all courts shall refer to the law and adduce the reasons on which every definitive judgment is founded." In its decision in the cases of petitioners herein the Court of Appeal of the First Circuit of Louisiana, failed to comply with these mandates of the Code of Practice and Constitution of Louisiana. It's said decision did not comply with that jurisprudence of the Courts of the various States of the United States nor with that of the Federal Courts. Under such an arbitrary and incomplete decree or de-

cision as rendered by the Court of Appeal in these cases, if held not to infringe or violate the equal protection and due process of law provisions of the 14th Amendment of the United States Constitution, it would be left in the power of that or any other Court to render a binding decree in any way it might desire, regardless of the evidence.

13. There can be no legal, logical or just reason assigned why there should be any distinction made by the United States Supreme Court or any other Court between an arbitrary act or judgment authorized by a statute or act of the State Legislature or an arbitrary decree rendered by a Court without any legislative sanction. Had the Louisiana Legislature enacted a law authorizing the Court of Appeal of Louisiana to decide a question of fact anyway it desired to decide same, to refuse to mention or consider any testimony or evidence it might desire to refuse to consider, and even to refuse to consider any question of law presented by a party to a law suit, there is not a question but that the Supreme Court of the United States would hold such a law a violation of the equal protection and due process of law provisions of the Federal Constitution. Surely it cannot be held that Court of Appeal without legislative sanction can do that which it could not do with such sanction.

III.

WHY THIS COURT HAS JURISDICTION.

1. The law or statute which makes it competent for this Court to issue or grant the writ of certiorari herein

sought, directed to the Court of Appeal of the First Circuit of the State of Louisiana, is Section 237 (b) of the Judicial Code (28 U. S. C. A., Section 344 (b).

2. That the arbitrary decree of the said Court of Appeal, which failed to consider the vital testimony and issues in these cases of petitioners, deprived each of petitioners of liberty and property and denied each of them the equal protection of law, and thereby violated the due process of law and equal protection of law provisions of the Fourteenth Amendment of the Constitution of the United States.

3. The decree of the Court of Appeal of First Circuit of the State of Louisiana was entered and rendered on March 4, 1941. Petitioners herein promptly and timely filed a petition for a rehearing in said causes in that Court. Among the matters urged in said application for a rehearing was the contention that by said decree plaintiffs and petitioners had been deprived of their liberty and property without due process of law and denied the equal protection of law, in violation of the 14th Amendment of the Constitution of the United States. The petition or application for rehearing was denied without comment by said Court of Appeal on April 14, 1941. Within the time provided by the laws of the State of Louisiana, plaintiffs and petitioners filed petition and application in the Supreme Court of the State of Louisiana therein stating that in various specified respects the decree of the Court of Appeal had violated the prohibitions of the 14th Amendment of the Constitution of

the United States, in that said decree had deprived them of their property and liberty without due process of law and had denied them the equal protection of law. Notwithstanding, that petitioners strenuously urged the Supreme Court of Louisiana to declare whether or not they had thus been deprived of the due process and equal protection of law, the Supreme Court of Louisiana on May 26, 1941, refused to grant a writ of certiorari in these cases, its holding thereon being in full as follows: "On the facts found by the Court of Appeal, the Judgment is correct."

4. "Of course the limit of time for applying to this court was from the date when the writ of certiorari was refused" in the State Supreme Court.

American Ry. Express Company v. Levee, 44 Sup. Ct., 11, 12, 263 U. S. 19.

5. The constitutional question of denial of due process and equal protection of law being based upon the decree of the Court of Appeal of First Circuit of the State of Louisiana did not have to be presented to that hibitions of the 14th Amendment of the Constitution of Court in these cases.

Saunders v. Shaw, 244 U. S. 317, 37 Sup. Ct. 638,

FEDERAL QUESTION SUFFICIENTLY AND TIMELY RAISED.

6. However, the constitutional questions invoked herein were presented to the Court of Appeal of the First Circuit of Louisiana as soon as it was possible to present same, and that in the application for a rehearing. That Court, in simply refusing the application for rehearing, passed upon said constitutional questions unfavorably to plaintiffs.

Saunders v. Shaw, 244 U. S. 317, 37 Sup. Court 638, 640.
Chicago, Burlington & Quincy Railroad v. City of Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 582.

7. Section 11 of Article 7 of the Constitution of Louisiana of 1921, shows the extent the Supreme Court of Louisiana may through writ of certiorari review a decision of the Courts of Appeal of Louisiana. That section states in part: "It shall be competent for the Supreme Court to require by writ of certiorari, or otherwise, any case to be certified from the Courts of Appeal to it for review, with the same power and authority in the case as if it had been carried directly by appeal to the said court; provided, that where the application is based solely upon the ground that the decision of the question of law involved is in conflict with the jurisprudence of the Supreme Court or other Court of Appeal upon a question not yet decided by the Supreme Court, and it is found that such is a fact, then the application shall be granted as a matter of right."

In the instant cases the Supreme Court of Louisiana,

in the words commonly used by it in refusing such writs, said: "On the facts found by the Court of Appeal, the Judgment is correct. Writ refused."

The effect of such action on part of the Supreme Court of Louisiana was determined by this Honorable Court in the case of *American Ry. Express Co. v. Levee*, 263 U. S. 19, 44 Sup. Ct. 11.

8. While the application of plaintiffs to the Louisiana Supreme Court, alleged that each of plaintiffs had by the decision of the Court of Appeal been deprived of his liberty and property without due process of law and denied the equal protection of law, and prayed for the said Court to rule upon and uphold said contentions, it was not necessary that they make such allegations therein. The denial of the application was a rejection of said contentions. Plaintiffs could do no more.

9. Plaintiffs as an aid to show why this Court has jurisdiction in these cases, adopts all those reasons under the foregoing heading, "Reasons Relied Upon for Allowance of this writ," stated in this petition for writ.

QUESTIONS PRESENTED.

The foregoing parts of this application or petition for writ are adopted to show the questions presented herein.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue from this Court and under

its seal, directed to the Court of Appeal of the First Circuit of the State of Louisiana, which is domiciled at Baton Rouge, Louisiana, commanding the said Court of Appeal to certify and send to the Supreme Court of the United States a full and complete transcript of the record and the proceedings in and of the said Court of Appeal in the aforementioned cases of Alfred Sidney Barton versus The Phelan Company and Robert L. Pace versus The Phelan Company, to the end that said causes may be reviewed and determined by this Court as provided by statutes of the United States and in particular by Section 237 (b) of the Judicial Code (28 U. S. C. A., Sec. 344 (b). Petitioners pray that the said judgment of the Court of Appeal of the First Circuit of the State of Louisiana be reversed and they each be awarded judgment against the defendant, The Phelan Company, in the sums and amounts to which they are legally and justly entitled. They pray for general relief.

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P. O. Address,
Shreveport, La.

Attorney for Petitioners.

BRIEF SUPPORTING PETITION FOR WRIT.

Accompanying the petition for writ and this brief are the printed brief of petitioners filed in the State Court of Appeal, marked "Exhibit A," and the printed brief of petitioners filed in the Supreme Court of Louisiana in support of their application to that Court for writ of certiorari, marked "Exhibit B."

In giving the page where certain testimony will be found in the record, "Exhibit A," uses the abbreviation, "Tr." before the figures showing the number of page. The Clerk of the Court of Appeal in making up certified copy of the record in these cases, at request of plaintiffs, preserved that "Tr." in the testimony of the witnesses, first at top of page giving the consecutive number of page of his record and just under same placing the "Tr:" number. The copy of testimony of witnesses in the transcript begins with folio 76 and "Tr. 74" and continues to folio 385, "Tr. 382."

If this record is printed and this designation of "Tr." is preserved at beginning of each page of the testimony, it will be easy for the Court in referring to "Exhibt A," to locate any page referred to therein. The application for writ in these cases being made in *forma pauperis*, the correct number of the page of printed record could not be inserted in this brief or the petition for the writ.

In these cases of Barton v. Phelan Co. and Pace v. Same, 200 So. Rep. 508, the decree of judgment upon very little consideration of this Honorable Court will

reveal it is no more than the arbitrary edict of the Court of Appeal of the First Circuit of Louisiana. It will reveal that the said decree seeks to determine nothing, but that the said decision does avoid all mention or discussion of the issue of negligence and the testimony of the five eye witnesses to the collision and all other important testimony or vital issues.

We doubt that any decision of any court of record in the United States can compare with this decision in passing over and failing to mention or discuss the vital testimony of witnesses and the issues of law.

The so-called physical fact seized upon by the Court of Appeal as being conclusive on the issues of fact, and its effort to make it appear that the trial Court's decision on a question of fact could not be reversed unless found to be manifestly erroneous, are manifestly unsound and not supported by facts or law. Only a presumption of the correctness of the opinion of the trial Court on a question of fact obtains when it weighs the testimony of witnesses it observed when testifying.

In these cases the trial Court expressly declared that "the Court is compelled to say in the main it must be totally disregarded." This disregard referred to the testimony.

That Court under the laws and jurisprudence of the State of Louisiana had no authority to disregard the said testimony under the guise of its being contradictory.

Fridge v. Talbot, et al., 180 La. 937, 948.
Webb v. Lambert, 128 So. Rep. (La. App.) 317.

Article 7, Section 7, Const. of Louisiana.
Article 539 of the Code of Practice of Louisiana.

The physical fact that the long heavy truck of defendant skidded from its north side of the highway over to the south side at the scene, was not sufficient to show that the collision occurred on the north side. The testimony of four eye witnesses to the contrary, supported by other strong physical facts should have been considered and accepted.

Western & A. R. v. Henderson, 279 U. S. 639, 49 Supreme Court 445.
Mc Michael v. Illinois Cent R. Co., 110 La. 18, 19.

The mere fact that the collision may have occurred on the north side of said highway, through Barton car dodging or striking the cow skidding over there, does not show that Barton was negligent nor dispense with consideration of the evidence. Unless it be shown Barton did something in that emergency others would not usually do, Barton should recover under the emergency rule of law in Louisiana; and plaintiff Pace should recover because he is not responsible for anything done by Barton, also upon the emergency rule.

Stout v. Nehi Bottling Co., 146 So. 857.
Logrand v. Dugan, 196 So. 564.
Morgan v. Lanz, 195 So. 128.
Rogers v. Silver Fleet, 180 So. 185.

Improvements on legal procedure will not tend to cause better or fairer decisions of Courts. The prohitions in the Fourteenth Amendment of the Federal Constitution as to due process and equal protection of

law, unless they include the arbitrary actions and decrees of Courts, can not reach a large per cent of the gravest violations of those prohibitions. It could have not been intended by those who drafted the United States Constitution that the arbitrary actions of Courts, in determining testimony or law, are not subject to these prohibitions, while the actions of legislative bodies are subject to same.

A review of the testimony in these cases by this Honorable Court will be sufficient to convince it that the decision of the Court of Appeal of Louisiana amounts to an edict, in no manner supported by the law and the evidence, and is contrary thereto. It will reveal that the question of negligence, which had to be decided to determine liability, was not discussed; and that the evidence and law relating to such negligence were not discussed. It will be seen that plaintiff Page, who was riding as an invited guest and did nothing contributing to the accident, was denied recovery without any determination of the issues involved in his case.

Respectfully submitted,

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(30)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 509

ALFRED SIDNEY BARTON

versus

THE PHELAN COMPANY

and

ROBERT L. PACE

versus

THE PHELAN COMPANY.

BRIEF OF DEFENDANT IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE FIRST CIRCUIT, STATE OF LOUISIANA.

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STATEMENT OF THE CASE.

Alfred Sidney Barton and Robert L. Pace brought suit against The Phelan Company in the Louisiana District Court (a court of general original jurisdiction) to recover damages for personal injuries received when the Ford V8

Sedan automobile in which they were riding collided with a Chevrolet truck with trailer, owned by The Phelan Company.

The principal question for decision was whose fault caused the accident, and as the physical facts in the case, supported by the testimony of several witnesses, showed that the Ford car in which Barton and Pace were riding left its proper side of the road—the South side—crossed over to its left or the North side of the road where the truck of The Phelan Company was travelling, and there collided with the said truck, the trial court held that the respondent was not at fault, and rejected the plaintiffs' demands.

Barton and Pace appealed the case to the Court of Appeal, First Circuit, Louisiana, a court which has appellate jurisdiction of both the facts and the law. Both the trial and appellate courts held that the collision did not happen through respondent's fault, both the trial and appellate courts finding that plaintiffs' car left its side of the road, and collided with respondent's truck, while it was well to its right of the road.

The appellate court discussed in detail the physical facts which showed that the collision took place on the respondent's side of the road, calling attention to the facts that the record showed that the brakes on the wheels of the truck were locked by the collision, and that as the truck was in motion at the time of the collision, the locked wheels skidded along the pavement, which was marked to such an extent by the skidding rubber tired wheels that a photo-

graph showing the skid marks was taken and introduced in evidence.

The record showed that the beginning of the skid marks was on the north of the defendant's side of the road, showing conclusively that the plaintiffs had left their side of the road, crossed over, and collided with respondent's truck when it was travelling on its proper side of the highway.

In affirming the lower court's decision in rejecting the plaintiffs' demands, the appellate court said:

> "The preponderance of the evidence is to the effect that the driver of the truck was travelling at a reasonable speed and on his line of travel (at the time of the accident)."

An application for a rehearing was refused by the Louisiana Court of Appeal, First Circuit, whereupon plaintiffs applied to the Supreme Court of the State of Louisiana for a writ of certiorari, which was refused, the State Supreme Court holding:

> "On the facts found by the Court of Appeal, the judgment is correct."

After this action by the Louisiana Supreme Court, counsel for the plaintiffs then sought from the United States Supreme Court a writ of certiorari directed to the Court of Appeal, First Circuit, State of Louisiana.

The only substantial ground alleged for granting the writ is that plaintiffs were denied due process of law in that the Louisiana courts arbitrarily disregarded plain-

tiffs' evidence, and this ground, it is here contended, is not supported by the record.

The record shows, in connection with briefs supporting this application, that plaintiffs seek to the Supreme Court a review of the Louisiana Courts' findings on disputed questions of fact.

ARGUMENT.

May It Please the Court:

I.

The Supreme Court is without jurisdiction in this case, because no Federal question is involved.

As ground for jurisdiction, the application for a writ of certiorari sets forth that due process of law was denied petitioners, because the trial and appellate courts of Louisiana made findings of facts without evidence to sustain such findings, and arbitrarily disregarded evidence introduced in behalf of the applicants for the writs.

In Louisiana the Court of Appeal reviews both findings of fact and of law made by the trial court, and in this case, Barton v. Phelan Co., Pace v. Same, Court of Appeal, Louisiana, First Circuit, *200 So. 508*, every finding of fact made by the Court of Appeal was amply supported by competent evidence, as is shown by a discussion of each reason urged by petitioners for the writ. (See subdivision III of this brief).

A decision of a state court upon a pure question of fact can not be reviewed by the United States Supreme

Court on a writ to the State Court. *Hallenbeck v. Leimert*, 295 U. S. 116; 79 L. Ed. 1339; 55 Sup. Ct. 687.

Mamouth Mining Co. v. Grand Central Mining Company, 213 U. S. 71; 53 L. Ed. 702; 29 Sup. Ct. 413.

Smiley v. Kansas, 196 U. S. 447; 49 L. Ed. 546, 25 Sup. Ct. 289.

II.

The issue of this case is not of public importance.

This is a suit for damages growing out of an automobile collision. It presents purely a question of fact, that is, whose fault caused the collision. No public or important question is involved in the case, and it is of importance solely to the litigants.

III.

No reason is given by counsel for Barton and Pace sufficient to justify the issuance by the United States Supreme Court of a writ of certiorari in this case.

A discussion of the various reasons urged by counsel for Barton and Pace in support of the application for writ of certiorari follows:

1. The plaintiffs' contention that there was want of due process of law because the Louisiana Court of Appeal rendered a judgment without any judicial determination of the facts which would support the judgment, is not supported by the record.

The judgment of the Louisiana Court of Appeal contains all findings of fact and law sufficient to sustain its decision.

The judgment of the Court of Appeal (Transcript of Record, Volume 2, page 386) shows that the court first made a statement of the case containing facts not in dispute; that it was the contention of the plaintiffs that respondent's truck, travelling on the north side of the highway, turned to its left and on to the south side of the highway in order to avoid striking a cow, and collided with the plaintiffs' automobile while it was on its proper side of the highway. The court then recited the contention of the respondent to the effect that the plaintiffs' automobile, in attempting to go around a cow crossing the road, turned off of its proper side of the road to its left, and while travelling at a high rate of speed, struck the cow and careened into the respondent's truck while said truck was on its proper side of the road, the collision causing the brakes on the left rear dual wheels of the truck to lock, and causing the truck to skid from the point of impact, on its side of the road, down the highway.

The appellate court quoted from the opinion of the trial court the latter's finding that:

> "at the time of the impact, Barton was on the wrong side of the road,"

and approved this finding of the trial court, saying:

> "A review of the record reveals that that conclusion (the finding of the trial court quoted) is correct." (Transcript of record, Volume 2, page 388).

The plaintiffs contended that the accident happened on the south side of the road, and in support of this contention they offered evidence as to the location on the highway of shattered glass, contending that the place where the glass was found was the place where the collision occurred. The Court of Appeal on this question said:

> "The evidence bearing on the question as to where shattered glass was found fails to convince us that the plaintiff has sustained the burden of proving that the shattered glass was on the south side and not the north side of the center strip." (Transcript, Volume 2, page 390).

The Court of Appeal in its judgment (Transcript, Volume 2, page 391) said:

> "It is our conclusion that the trial judge was correct in finding that the collision occurred on the north side of the center stripe (on the highway) and we fail to find that the plaintiffs' action in crossing over the center stripe was caused by any act of the defendant's (respondent's) truck driver. The preponderance of the evidence is to the effect that the driver was travelling at a reasonable speed and on his line of travel. It is not clear as to whether or not he had dimmed his lights, the plaintiff contending that he had not and the driver contending that he had; but admitting that the bright lights were on just prior to and at the time of the collision, that does not appear to have contributed to the accident. The most logical explanation of the accident is contained in statements of some of the occupants of the Barton car made on the night of the accident, to the effect that the plaintiff Barton tried to dodge a cow which was crossing the road and in doing so swerved to his left and into the truck. The physical facts support this testimony.

> "For the reasons set forth, we can not find manifest error in the lower court's conclusion of fact to the effect that the plaintiffs have failed to sustain the burden of proof in showing that the accident was caused by the negligence of the defendant's truck driver. The judgments are therefore affirmed."

It thus appears from the decision of the Court of Appeal that there was a finding of fact made by it, which showed that the plaintiffs were not entitled to recover, namely, that the accident took place on the respondent's side of the road; that the action of the plaintiffs in leaving their side of the road and striking respondent's truck when it was on its proper side of the road was not caused by any act of respondent's truck driver; that the accident occurred because the plaintiffs, in attempting to avoid striking a cow, swerved their car to their left and into respondent's truck while it was on its side of the road; and that the lower court's judgment, finding that the plaintiffs had failed to sustain the burden of proof by showing that the accident was caused by the negligence of the truck driver, was affirmed.

When the Court of Appeal found that the accident happened on the respondent's side of the road, and that respondent's truck driver in no wise caused the plaintiffs' automobile to leave its side of the road and run into respondent's truck, the Court of Appeal necessarily made a sufficient finding of fact upon which to base its judgment, for such finding was in effect a finding that there was no negligence on the part of respondent's truck driver.

No recovery can be had against respondent, of course, unless its truck driver was in some manner at fault.

Again, the Court of Appeal made a finding sufficient upon which to base its judgment when it held, as did the trial court, that the plaintiff had failed to sustain the burden of proof in showing that the accident was caused by the negligence of respondent's truck driver.

2. The plaintiffs' contention that there was want of due process of law because the Louisiana trial court and appellate court arbitrarily disregarded plaintiffs' testimony, is not supported by the record.

The opinion of the Court of Appeal shows that its judgment was based upon the testimony of witnesses, including some of plaintiffs' witnesses, supported by physical facts the interpretation of which can not be contested.

It is conceded that if there is substantial testimony from substantial witnesses on important points in a case, and no evidence to the contrary, a court which arbitrarily disregards such testimony violates the due process of law provision of the Federal Constitution, but that is not what happened in this case. Here, the testimony on the material question as to whose fault caused the accident was in conflict, and upon considering the record, which showed that some of the witnesses testified that the accident happened on the plaintiffs' side of the road, thus tending to show that respondent's truck driver was at fault, and other witnesses, corroborated by incontestable physical facts, testified that the accident happened on the respondent's side of the road,

thus establishing the fact that the plaintiffs were at fault, the court held that the plaintiffs had failed to sustain the burden of proof by showing that the accident was caused by the negligence of respondent's truck driver.

Since the plaintiffs' automobile, and respondent's truck were travelling toward each other on the highway when the collision occurred, it was important in order to determine whose fault caused the accident, to decide on whose side of the highway the collision occurred. Both the Louisiana trial court and Court of Appeal first made a finding of fact on that point, both holding that the collision occurred on respondent's side of the road.

This finding of the trial court was based almost entirely upon the physical evidence showing where the collision took place, and the same finding of the Court of Appeal was based on this physical evidence corroborated by the testimony of witnesses. Skid marks made by the wheels of respondent's truck appeared on the highway, beginning on the north or respondent's side of the highway, and running some distance down the highway on the north side, and on the south side of the road. Both courts found that the collision caused a jamming of the brakes and the locking of the wheels of the truck, and that the locked wheels skidding on the pavement caused the skid marks. Two of plaintiffs' witnesses, Blackley (Tr. 167) and Hicks (Tr. 245), and three witnesses for respondent, Wallace (Tr. 30), Brown (Tr. 108) and Lafosse (Tr. 107), all testified that the left rear driving wheels of the truck were locked in the collision. Brown (Tr. 100), Vandegriff (Tr. 287), Parker (Tr. 343) and the plaintiffs' witness Blackley

(Tr. 165) all testified that the accident happened on the truck driver's side or the north side of the road.

Both of the plaintiffs, Barton and Pace, and two of their witnesses, Bailay and Donahoo, at a time not suspicious, signed statements showing that the plaintiffs claimed the accident happened because they turned their car to the left or to the north side of the road in order to go around a cow which they struck and then ran into the respondent's truck. (Tr. 51, 52, 53). The plaintiff Pace made the same explanation to Dr. Gray shortly after the accident. (Tr. 267).

The plaintiffs sought to show that the accident happened on the south side of the road, and therefore that respondent's truck driver was at fault in leaving his side of the road and running into plaintiffs' automobile, and plaintiffs contended that glass found on the highway was found on the south side of the highway at the point of collision. The Court of Appeal discussed the testimony of six of plaintiffs' witnesses on this question, naming the witnesses, and showed why it was their testimony did not establish by a preponderance of the evidence that shattered glass was found on the south or plaintiffs' side of the highway. These witnesses were Hicks, Donnehoo, Hoskins, Blackley, Lanier and Bass.

The appellate court then discussed the testimony of other witnesses, which it believed, showed that there was shattered glass on the highway from the point where the skid marks began, on the north or respondent's side of the road, and along the highway for some distance. As an additional ground for holding that the shattered glass did

not first appear on the south side of the highway, the Court of Appeal said other evidence, including the physical evidence of the beginning of the skid marks, showed that the collision occurred on the north or the truck driver's side of the highway.

Since the testimony of plaintiffs' own witnesses, and written statements signed by the plaintiffs themselves, as well as an admission by one of the plaintiffs, would have been sufficient to sustain a judgment for respondent, without regard to the other oral testimony and the physical evidence in the case supporting respondent's contention, it can not be held that the Louisiana courts arbitrarily disregarded the plaintiffs' evidence, and thus denied them due process of law.

3. The plaintiffs' contention in their third reason in the application for a writ, to the effect that the Fourteenth Amendment to the Federal Constitution, against depriving one of his property or liberty without due process of law "extends to all acts of the state, whether through its legislature, its executive or its judicial authorities," is correct, but has no application to this case.

4. The contention of the plaintiffs in their fourth reason why the writ should be granted, to the effect that the motives of courts in rendering a decision must be determined by the effect of their decision, is correct, but plaintiffs' contention that the motive of the Louisiana courts, in rendering their judgment in this case, was bad because the Louisiana courts arbitrarily disregarded the plaintiffs' testi-

mony, is not sustained by the record, as is shown by the discussion herein under plaintiffs' second reason for the issuance of the writ.

5. The contention of the plaintiffs in their fifth reason for the issuance of the writ, that the defendant is bound by admissions in its answer, is correct. Plaintiffs' further contentions that respondent admitted any liability in its answer, that the respondent admitted facts tending to show negligence on the part of respondent's truck driver, and that respondent admitted in its answer facts which showed that respondent created an emergency in which plaintiffs were compelled to act, are not correct and are not borne out by the record.

The defendant (respondent) in its answer denied all alleged acts of negligence, made absolutely no admissions of any nature whatsoever in its answer, and in its affirmative defense made no allegations showing or tending to show negligence on the part of the defendant, or showing or tending to show that defendant created any emergency in which the plaintiffs were caused to act.

The answer of respondent, which is found at page 11, Volume 2 of the Transcript, in its first paragraph, denied every allegation of the petition except those allegations which might be specifically admitted.

In paragraph 24 of the answer it was especially denied that respondent's truck driver swerved to the left to avoid hitting a cow, although it was admitted in para-

graph 26 of the answer that respondent's truck driver saw the cow on the highway and could have stopped his truck had there been any danger of striking the cow, and it was especially alleged that no such danger presented itself.

In Paragraph A of the answer, at page 15, Volume 1 of the Transcript, the defendant (respondent) made the allegation that the plaintiffs' automobile attempted to pass the cow on the right of the automobile and the truck on the left of the automobile, and that in so doing the plaintiffs' automobile struck the cow and skidded into the left rear or drive wheels of the truck.

These allegations in respondent's answer neither show nor tend to show any negligence on the part of the truck driver.

There is nothing in the record to show that the respondent is responsible for the stray cow crossing the highway, and the record does show that respondent's truck slowed down and allowed the cow to pass safely in front of it.

Respondent's truck driver, of course, was not responsible for the fact that plaintiffs did not comply with their plain duty and stop or slow down and allow the cow to cross the road ahead of them.

If there was any emergency created at the point of the collision, it was created by the failure of the driver of the automobile to comply with his legal obligation to slow down or stop and avoid running into the cow. Certainly respondent's truck driver had nothing to do with

the plaintiffs leaving their side of the road, driving on to respondent's side of the road, and crashing into respondent's truck.

The Court of Appeal specifically held that the truck driver was not liable for acts of the driver of plaintiffs' automobile in leaving plaintiffs' side of the road, in violation of the rule of the road, and running into respondent's truck when it was on its proper part of the road.

The Louisiana Supreme Court, in denying a writ of certiorari to the Court of Appeal in this case, in effect said that on the findings of fact made by the Court of Appeal, its decision on the law was correct. The highest court in the state having thus decided there was no legal responsibility on the part of respondent for the action of the driver of plaintiffs' car in travelling on the wrong side of the highway and causing the collision, establishes the law of this state, which is binding on the United States Supreme Court.

The error into which plaintiffs' counsel has fallen is in assuming that respondent's truck driver is liable for damages caused by the plaintiffs in trying to avoid an emergency created by the plaintiff who was driving their automobile.

6. In the sixth reason for granting of writ of certiorari, plaintiffs contend that the Court of Appeal failed to discuss the vital points of the case and the testimony of witnesses thereon; that said Court placed great emphasis upon matters of no impor-

tance; that the decision gave great weight to the testimony of one witness, whose testimony was allowed to overcome the testimony of seven other witnesses, and that the case was decided without a fair and full consideration of the facts.

The record does not show that the Court of Appeal decided the question as to where shattered glass was found on the highway on the testimony of the one witness, LaFosse.

The Court's opinion shows by its analysis of the testimony of witnesses for the plaintiffs, who testified on the subject of the location of the shattered glass, that it was not sufficient to establish the location of the shattered glass.

Moreover, the Court of Appeal specifically stated that its finding on this subject was based not only on the testimony of LaFosse, as against the uncertain and unsatisfactory testimony of other witnesses, but was based upon its well established prior finding that it was abundantly shown otherwise that the collision took place on the truck driver's side of the road.

As pointed out previously in this brief, the record contained abundant evidence to show that the collision took place on the truck driver's side of the road, and that he was not guilty of any negligence. This being true, it cannot be correctly said that the judgment of the Court of Appeal is a mere edict and without facts to justify it.

7. In the seventh reason for the issuance of the writ, plaintiffs urge that if this Court should grant a writ of certiorari to review a case which was decided arbitrarily and without facts to support it, such action by this Court would discourage such decisions in the future.

As an abstract proposition this contention is correct but it has no application to this case.

8. In the eighth reason for the issuance of the writ of certiorari, plaintiffs contend that the physical fact of the skidding of respondent's truck from its side of the highway should not be held conclusive evidence that the collision took place on the truck's side of the highway, where four eye-witnesses testified the collision took place on the south side of the highway, and that the Court of Appeal failed to give any weight to testimony offered by the plaintiffs on this subject.

As shown by respondent in its discussion of the second reason for the granting of the writ, the Court of Appeal did not decide the question as to where the accident took place solely on the physical facts of the truck's skid marks.

As noted above, three defense witnesses and one of plaintiffs' witnesses testified that the accident happened on the truck driver's side of the road, and both of the plaintiffs and one of plaintiffs' witnesses signed statements to

the effect that plaintiff's automobile turned to the left, struck a cow, and hit the respondent's truck on the north side of the road.

It seems that the real contention made by counsel for the plaintiffs on this question is that the Louisiana courts made an error in deciding a question of fact.

9. In this reason urged by the plaintiffs for granting of a writ, it is contended that the United States Supreme Court may properly read the record and consider all of the testimony in these cases to determine the Federal question herein presented.

The respondent admits that the United States Supreme Court may properly read the record in these cases but only for the purpose of determining whether or not there was any substantial evidence justifying the findings made by the Louisiana courts, it being elementary that the United States Supreme Court will not review the findings of a state court on pure questions of fact. (See citations under discussion of Subdivision I of this brief).

10. In the tenth reason for issuance of the writ, plaintiffs contend that the evidence in these cases does not show negligence on the part of the plaintiff, Pace, which caused or contributed to his injuries; that the Court of Appeal made no finding in terms that Pace was guilty of any negligence; and that the Court of Appeal made no finding as to negligence on the part of the plaintiff, Barton, causing the accident.

What the Louisiana courts found in these cases was that respondent's truck driver was not guilty of any fault in connection with the accident.

After first finding that the accident happened on the truck driver's side of the road, the Court (Tr. 391) held:

> "* * * we fail to find that plaintiff's action in crossing over the center line was caused by any act of the defendant's truck driver."

In the closing paragraph of its decision, the Court of Appeal held:

> "We cannot find manifest error in the lower court's conclusion of fact to the effect that the plaintiffs have failed to sustain the burden of proof in showing that the accident was caused by negligence of defendant's truck driver."
> (Tr. 392).

The Court of Appeal thus decided as a matter of law, from the facts it found, there was no negligence on the part of the truck driver.

In Louisiana one without fault cannot be held liable for damages sustained by another.

Civil Code, Article 2315, reads in part:

> "Every act of man whatever that causes damages to another obliges him by whose fault it happened to repair it * * *."
> *Davis v. Shaw, 142 So. 301.*

Conceding for the sake of argument that the plaintiff, Pace, who was a guest in the automobile driven by

Barton, was nowise in fault in the accident, his remedy is not against the one who was an innocent victim of the collision, the respondent, but his remedy is against the man whose fault caused the accident, in this case, his co-plaintiff, Barton.

The decision by the Court of Appeal that there was no negligence in this case on the part of respondent's truck driver, in itself, necessitated a decision in favor of the respondent.

When the Court of Appeal in this case found that the accident was caused by the plaintiffs leaving their side of the road and running into respondent's truck on its side of the road, it necessarily found that the driver of the plaintiffs' automobile caused the accident through his fault and negligence. There was no necessity, however, for the Court of Appeal to use language in this finding specifically saying that the driver of the said automobile was negligent. At any rate it was sufficient for the Court of Appeal to find, as it did, that the respondent's truck driver was not negligent.

Since a finding of both law and fact on an issue decisive of the case was made by the Court of Appeal, there was no want of due process on the ground that the Court's judgment was a mere edict.

11. In this reason for issuance of the writ plaintiffs' contention that under the law of Louisiana, the defense of contributory negligence must be alleged and established by a fair preponderance of the evidence, is a correct statement of the law. The

further contention in this assignment that there was no negligence or contributory negligence on the part of the plaintiffs is correct as to the plaintiff, Pace, a guest in the automobile, but as has been shown it is not correct as to the plaintiff, Barton.

12. The contention of plaintiffs in their twelfth assignment of reason for issuance of the writ, to the effect that the judgment of the Court of Appeal violated the equal protection and due process of law provisions of the Federal Constitution in that it did not decide all points in controversy between the parties and did not refer to the law or give reasons for its judgment, is not correct.

There is no Federal Constitutional requirement that Louisiana courts give reasons or cite the law upon which their decisions are based.

The record shows that the Court of Appeal decided the respondent's truck driver was not at fault in the accident, and a decision of that point put an end to the controversy.

In view of the facts that the Court of Appeal wrote six and one-half pages of typewritten matter on legal size paper, detailing its findings and giving reasons therefor, it can not be said that the Court of Appeal gave no reasons for judgment.

If the Louisiana courts have not followed the requirements of the Louisiana law as to recitals in their

judgments, that is a matter which is not the subject of jurisdiction of the United States Supreme Court.

This Court has never held that the failure of a state court to make recitals in its judgment, required by state law, constitutes a denial of due process of law guaranteed by the Federal Constitution.

There was a compliance by the Louisiana appellate court with all requirements as to recitals in its judgment.

The *Louisiana Code of Practice, Article 539*, reads:

> "Definitive or final judgments are such as decide all the points in the controversy between the parties."

The language quoted has reference to trial courts only. (See Part II, Title I, Louisiana Code of Practice, Article 124).

Moreover, the language quoted means that only controversies necessary for a decision of the case need be decided.

In this case both the trial court and the Court of Appeal decided respondent's truck driver was not at fault. Since that was true, it would have been a vain thing for the courts to have held in so many words, though they did so hold in effect, that plaintiff Pace, the guest in Barton's car, was not guilty of negligence, or that the plaintiff Barton was guilty of negligence.

When the Court of Appeal, in its opinion, said the trial court:

> "decided the case in effect on the point the defendant's (respondent's) truck driver was not guilty of negligence,"

and then affirmed that decision, that constituted a sufficient reference to the law.

Again, when the appellate court found that

> "the plaintiffs have failed to sustain the burden of proof in showing that the accident was caused by negligence of the defendant's truck driver,"

that was a finding of the law sufficient to dispose of the case.

Under Article 7, Section 1, of the Louisiana Constitution of 1921, reading in part

> "* * * The judges of all courts shall refer to the law and adduce the reasons under which every definitive judgment is founded",

it is not required that the Court refer to any particular decision, statute or law. It is quite sufficient if it appears from the decision that it is rendered in accordance with the law.

Harris v. Pickett, 37 La. Ann. 741.

13. The plaintiffs correctly state the law in their thirteenth reason for the issuance of the writ of certiorari to the effect that the United States Supreme Court has the power under the due process of law and equal protection of the law provisions of

the Federal Constitution to protect an injured litigant from the effects of a purely arbitrary judgment not supported by law or facts.

However, as shown, this abstract proposition of law has no application to this case.

CONCLUSION.

This Court has no jurisdiction to issue writ of certiorari in this case on the ground that the plaintiffs were denied due process of law by the State court based on the contention that the State court arbitrarily decided this case without regard to plaintiffs' evidence and with no evidence to support its findings, the record showing that the evidence abundantly supported the judgment of the appellate court.

This case properly presents only one issue, and that is whether the judgments of the State courts were correct. That is a matter of no importance to the public, or to anyone except the litigants, and for that additional reason the writ of certiorari should not issue.

Respectfully submitted,

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